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CITATIONS

280-009—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 86

UNITED STATES OF AMERICA, APPELLANT

v.

THIRD NATIONAL BANK IN NASHVILLE, NASHVILLE BANK AND TRUST COMPANY AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 84) is reported at 260 F. Supp. 869. Its findings of fact and conclusions of law (R. 109–163) are unreported.

JURISDICTION

This is an action under Section 4 of the Sherman Act, 15 U.S.C. 4, and Section 15 of the Clayton Act, 15 U.S.C. 25, to enjoin violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 7 of the Clayton Act, 15 U.S.C. 18. The judgment of the district court (R. 164) was entered on December 16,

1966. A notice of appeal to this Court was filed on February 10, 1967. This Court noted probable jurisdiction on June 12, 1967 (R. 167; 388 U.S. 905). The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by Section 2 of the Expediting Act, 15 U.S.C. 29. *United States* v. *Continental Can Co.,* 378 U.S. 441; *United States* v. *duPont & Co.,* 353 U.S. 586.

STATUTES INVOLVED

The Bank Merger Act of 1966, and the pertinent portion of Section 7 of the Clayton Act, are printed in the Appendix, *infra,* pp. 35–42.

QUESTIONS PRESENTED

1. Whether, in an antitrust action challenging a bank merger, the court, in deciding whether the effect of the merger "may be substantially to lessen competition" within the meaning of the Bank Merger Act of 1966, should apply the standards that this Court has announced in interpreting the identical words in Section 7 of the Clayton Act.[1]

2. Whether in such an action the court should make an independent determination of the merger's legality or merely review the banking agency's determination to ascertain whether it is supported by substantial evidence.

3. Whether the court may properly deem a bank merger's anticompetitive impact clearly outweighed in the public interest by its probable effect in meeting

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[1] In order to simplify the issues on appeal, we have not challenged the district court's dismissal of the Section 1, Sherman Act, charge in the complaint.

the convenience and needs of the community to be served, without finding that there was no reasonable probability of achieving the same benefits through means having a less anticompetitive effect.

4. Whether, apart from the feasibility of less anticompetitive alternatives, the public benefits of the instant merger reached the level required to invoke the convenience and needs defense under the Bank Merger Act.[2]

STATEMENT

1. THE PROCEEDINGS

On March 12, 1964, the Third National Bank in Nashville ("Third National") and the Nashville Bank and Trust Co. ("Nashville Bank") agreed to merge. On April 27, 1964, they applied to the Comptroller of the Currency for approval of the transaction, as required by the Bank Merger Act of 1960, 74 Stat. 129. Pursuant to the provisions of that Act,[3] the Fed-

[2] This question was reserved in our Jurisdictional Statement (p. 2, n. 21; p. 21, n. 12).

[3] The Bank Merger Act of 1960 provided in pertinent part: "In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this Act. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve

eral Reserve Board, the Federal Deposit Insurance Corporation and the Department of Justice submitted reports to the Comptroller of the Currency on the competitive factors involved in the proposed merger. The Federal Reserve Board concluded that the merger "would have clearly adverse effects on competition" because it "would eliminate direct competition which exists between participants and would increase significantly * * * already heavy concentration." (GX 498, R. 965.) The Federal Deposit Insurance Corporation advised that "the effect of the proposed merger on competition would be unfavorable." (GX 497, R. 955.) The Department of Justice concluded that the merger "would have severe anticompetitive effects upon banking competition in Metropolitan Nashville and would significantly increase the marked tendency toward oligopoly existing in the area generally." (GX 496, p. 6.) Despite these reports, the Comptroller of the Currency approved the merger on August 4, 1964, stating that it would not lessen competition and that it would "improve the charter bank's ability to service the convenience and needs of the Nashville public" (DX 8, R. 1201).

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the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of liabilities under this subsection, the agency (unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved) shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection * * *."

On August 10, 1964, the United States filed suit in a federal district court, charging that the proposed merger might lessen competition substantially in violation of Section 7 of the Clayton Act (15 U.S.C. 18), and that it restrained trade in violation of Section 1 of the Sherman Act (15 U.S.C. 1). On August 18, 1964, the district court denied the government's motion for a preliminary injunction to stay the merger's consummation (R. 58–66). The two banks merged on the same day.

Before the case was tried, Congress passed the Bank Merger Act of 1966 (App., *infra*, pp. 35–42). Expressly applicable to cases (like the present one) that were pending in court on the effective date of the Act (February 21, 1966), it provides in relevant part that a federal banking agency "shall not approve [a proposed bank merger] * * * whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." In any action under the antitrust laws to challenge such a transaction, "the standards applied by the court shall be identical with those that the banking agencies are directed to apply."

On February 28, 1966, the Comptroller of the Currency intervened as a party in the action (as the new Act also permits). He testified at the trial that he did not believe that the merger would lead to a substan-

tial lessening of competition, and that "the convenience and needs of the community to be served as a result of this merger clearly outweigh any anticompetitive effect that the merger might have had" (Fdg. 301, R. 161).[4]

After trial, the court, on November 22, 1966, issued an opinion holding for the defendants (R. 84–108). The court subsequently entered findings and its judgment dismissing the complaint (R. 109–163, R. 164).

2. THE FACTS

Prior to the merger, Third National, the acquiring bank, was the second largest bank in Davidson County, Tennessee (Metropolitan Nashville). It accounted for 33 percent of all deposits and 36.7 percent of all loans held by the county's banks (Fdg. 66, R. 121–122). Nashville Bank, the acquired bank, was the county's fourth largest, accounting for 4.8 percent of all deposits and 4.3 percent of all loans (Fdg. 66, R. 121–122). The merger made Third National the county's largest bank, increasing its share of total deposits from 33 to 39 percent and its share of total loans from 36.7 percent to 40.3 percent[5] (Fdg. 66, R. 121–122).

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[4] "Fdg." references are to the district court's findings of fact (R. 109–163).

[5] As of June 30, 1964, the relative size of each of the banks in the county was as follows (Fdg. 66, R. 121–122):

Banking in Davidson County is heavily concentrated. The merger increased concentration among the county's three largest banks in deposits from 93.1 to 97.9 percent and in loans from 93.6 to 97.9 percent, and resulted in the elimination of the only medium-sized bank in the county (Fdg. 66, R. 121–122). Since 1927 there has been only one new bank in the county (Tr. 921–923), Capital City Bank, and it accounted for less than 1 percent of the county's deposits and loans at the time of the merger (Fdg. 66, R. 121–122).

Nashville Bank, while considerably smaller than the county's three largest banks, had experienced sub-

[Dollar amounts in millions]

Bank	Assets		Deposits		Loans	
	Amount	Percent	Amount	Percent	Amount	Percent
First American National	$407.2	38.3	$371.1	38.9	$185.3	35.0
Third National	357.1	33.6	315.1	33.0	194.4	36.7
Commerce Union	225.5	21.2	202.6	21.2	115.9	21.9
Nashville Bank	50.9	4.8	45.5	4.8	22.8	4.3
Capital City	9.1	.9	7.3	.8	3.6	.7
Bank of Goodlettsville	6.8	.6	6.4	.7	4.3	.8
Citizens Savings	3.4	.3	3.1	.3	1.8	.3
White's Creek	2.8	.3	2.6	.3	1.4	.3
Total	1,062.8	100.0	953.5	100.0	529.7	100.0

By October 1, 1964, the relative size was as follows:

[Dollar amounts in millions]

Bank	Assets		Deposits		Loans	
	Amount	Percent	Amount	Percent	Amount	Percent
Third National Bank	$415.9	38.7	$378.9	39.0	$219.7	40.3
Nashville Bank	(ᵃ)		(ᵃ)		(ᵃ)	
First American National	410.0	38.2	372.0	38.3	195.6	35.9
Commerce Union	224.5	20.9	200.1	20.6	117.9	21.6
Capital City	9.9	.9	8.1	.8	3.9	.7
Bank of Goodlettsville	6.9	.6	6.4	.7	4.5	.8
Citizens Savings	3.4	.3	3.1	.3	1.8	.3
White's Creek	2.9	.3	2.6	.3	1.5	.3
Total	1,073.8	100.0	971.2	100.0	545.0	100.0

ᵃ Merged

Any discrepancies between the figures in the text and in this note are due to slight differences in the dates to which the various statistics pertain.

stantial growth in the ten years preceding the merger. Between 1955, the year before W. S. Hackworth became president and began to develop its commercial banking operations, and 1964, Nashville Bank's deposits grew from $20.8 million to $45.5 million, and its loans and discounts from $8.1 million to $22.8 million. Its rate of growth in both categories was higher than the average rate for all banks in the county and higher than the rate of growth for Third National (Fdgs. 58, 61, R. 119–120). Between 1955 and 1963, Nashville Bank's net income after taxes rose from $99,000 to $368,000 (Fdg. 65, R. 121).

Although Nashville Bank's rate of growth slowed somewhat between 1959 and 1964, it continued to grow steadily. Between 1959 and 1964, its deposits increased from $33.2 million to $45.5 million (Fdgs. 58–59, R. 119) and its loans and discounts increased from $16.6 million to $22.8 million (Fdgs. 61–62, R. 120). Its net income after taxes grew from $184,000 in 1959 (R. 782) to $368,000 in 1963[6] (Fdg. 65, R. 121) and the bank paid dividends of $106,000 in 1963 (R. 783).[7]

While considerably smaller than Third National, Nashville Bank was of sufficient size to offer most of the services offered by the former (R. 72–74), and in addition provided the personal attention characteristic of smaller banks (R. 173). Although Nashville Bank did not compete with the three largest

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[6] The last full year prior to the merger.

[7] Despite Nashville Bank's substantial growth between 1960 and 1964, its market share declined during that period from 5.72 to 4.83 percent, (Fdg. 134, R. 132).

banks for correspondent banking (Fdg. 95, R. 126), it was a notable competitor in several other important areas. In particular, it competed aggressively for small and medium sized business and individual accounts and loans (R. 285–286, 345–346), on occasion making business loans to individuals rejected as marginal risks by the three major banks (R. 845–846, 856–858). Originally a trust institution (Fdg. 11, R. 111), Nashville Bank had a well managed trust department (R. 100) that was the third largest in Nashville (GX 1006, R. 1161). None of Davidson County's small banks had a substantial trust business (GX 1006, R. 1161): Nashville Bank actively competed for demand accounts by maintaining generally lower service charges than other banks. Its charges for regular checking accounts were lower than those of the three largest banks (GX 1026, R. 1180). In addition, it competed for auto loans, and unlike the large banks, which emphasized indirect loans to consumers using the auto dealers as middlemen, Nashville Bank specialized in direct loans to the consumer (Fdg. 253, R. 150); these are generally cheaper to the borrower than indirect loans (R. 579, 868). Although Third National had 8.5 times as many loans and discounts as Nashville Bank, the latter carried 1600 automobile accounts on a direct basis, compared with 3200 for the former (R. 600).

Control of Nashville Bank changed hands two months before its merger with Third National. H. G. Hill, a conservative (Fdg. 278, R. 153) and influential (Fdg. 115, R. 129) Nashville businessman, had controlled Nashville Bank (R. 99–100). In January

1964, Hill and Hackworth, the bank's president, sold a controlling interest in the bank (10,845 shares at $350 per share) to a group of prominent Nashville citizens led by William C. Weaver, an insurance executive (Fdg. 118, R. 130).[8] During negotiations, Hill and Hackworth disclosed to the Weaver group what they regarded as the chief problems facing the bank: management, the lack of branch banks, the lack of a pension plan that was funded, and the lack of automation and a computer (R. 491). As part of the purchase agreement, Hackworth agreed to remain as an executive officer for two more years (GX 3, R. 927–928), and both he and Hill agreed to retain substantial holdings of Nashville Bank stock (*ibid.*; Fdg. 13, R. 112).

Nashville Bank, despite its growth and solvency, indeed faced several problems, including one of management succession. Hackworth, its president and the man largely responsible for its growth since 1956 (Fdg. 115, R. 129), was 68 years old, in ill health, and wished to retire within a few years (Fdg. 129, R. 131–132). An important business solicitor, Kirby Primm, resigned after the sale to Weaver (Fdg. 126, R.

[8] Weaver's associates included several officers of National Life and Accident Insurance Company, among them E. W. Craig, Chairman of the Board; Eldon Stevenson, Vice-Chairman of the Board; G. D. Brooks, Senior Vice-President and Chairman of the Finance Committee; and Walter M. Robinson, Jr., Associate General Counsel. Other prominent Nashville citizens in the purchasing group include Amon Carter Evans, Publisher of the Nashville Tennessean, and Guilford Dudley, Jr., President of Life & Casualty Insurance Company (GX 6; R. 538).

131). Other concerns were that the bank had only one branch office (Fdg. 74, R. 123) and that it lacked computers or other automated equipment. In addition, its average salaries for officers and employees were lower than those of the three larger banks in Davidson County (Fdg. 136, R. 133) and its pension plan was unfunded (R. 102).

In February 1964, Weaver and his group, having no desire to manage the bank themselves (Fdg. 119, R. 130), engaged in negotiations looking to a merger with Commerce Union (Fdg. 120, R. 130). Commerce Union was Nashville's third largest bank and accounted for about 21 percent of Metropolitan Nashville's banking business (Fdg. 66, R. 121–122). Negotiations foundered, however, when Weaver demanded \$460 per share and Commerce Union offered only \$360 (Fdg. 120, R. 130, R. 251–252). Weaver then negotiated the sale to Third National, which agreed to pay about \$420 per share (R. 534–536). Hill resigned as board chairman at that time (Fdg. 128, R. 131). The merger was approved by the boards of directors of both banks shortly afterwards (Fdg. 123, R. 130).

3. THE DISTRICT COURT'S DECISION

In dismissing the government's complaint, the district court held that the Bank Merger Act of 1966 amended Section 7 of the Clayton Act not only by requiring the court in an antitrust suit involving a bank merger to balance against the merger's anticompetitive effects its beneficial consequences in meeting com-

munity convenience and needs, but also by changing the standard—enunciated by this court in *United States* v. *Philadelphia National Bank,* 374 U.S. 321, and other cases interpreting Section 7—for determining whether a merger may lessen competition substantially. The court held that bank mergers are "to be assessed as to anticompetitive effects not alone on the basis of the quantitative analyses of the * * * *Philadelphia* case * * *, but, in addition, by taking into account all material factors with respect to each institution in the setting of the relevant market * * *" (R. 95; Fdg. 82, R. 124). It ruled expressly that the criteria that this Court had used in *United States* v. *Columbia Steel Co.,* 334 U.S. 495, to determine whether a challenged merger violated Section 1 of the Sherman Act,[9] criteria "relegated to a place of relative unimportance in the *Lexington* case [*United States* v. *First Nat. Bank & Trust Co. of Lexington,* 376 U.S. 665], are considered to have been restored to grace with respect to bank mergers by reason of the 1966 Amendment" (R. 106).

Applying this broad standard, the court held that the merger would not lessen competition substantially. The court did not believe it "unreasonable that [in such a relatively small banking market] there should be a concentration of approximately 93% of combined assets in three banking institutions" (R.

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[9] Namely, "dollar volume * * * [,] percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market." 334 U.S. at 527.

105). Moreover, Nashville Bank had accounted for only about 5 percent of the market, and in the court's view this addition to Third National's share was "not sufficiently large to have a substantial effect upon competition" (Fdg. 188(b), R. 140). According to the court, remaining competition was strong, the motive for the merger was not predatory, the market was rapidly growing and showed no trend toward concentration, the remaining banks were well managed, Nashville Bank was stagnating at the time of merger and had critical problems, and the record belied any "actual or probable future of oligopolistic behavior" (R. 106–107).

In addition to concluding that the merger did "not violate the antitrust standards of the 1966 Amendment" (R. 107), the court held that any anticompetitive consequences were clearly outweighed by considerations of community convenience and needs. It indicated that the Comptroller's findings on this issue could not be disturbed "unless they are unsupported by substantial evidence" (R. 91; Fdg. 302, R. 161–162), and that in this case his findings were well supported (Fdg. 302, R. 161). The court stated that Nashville Bank before the merger was "floundering," in that it had serious management problems, its growth had leveled off, it did not use modern banking methods, its quarters were old, some of its loans were doubtful, and it had only one branch. The court found that the merger served the needs and convenience of the community by solving these problems; by increasing the legal lending limits of the resulting bank; by providing the customers of Nashville Bank with more bank

offices, a correspondent banking system, and a fully automated operation; by assuring its employees higher salaries and a funded pension plan; and by providing Nashville Bank with a new building, membership in the Federal Reserve System, better research facilities, more capital, a small-business investment affiliate, an experienced credit department, and a more efficient auditing department (R. 107–108, 102, 103; Fdgs. 196–197, R. 141–142).

ARGUMENT

INTRODUCTION AND SUMMARY

Almost all bank mergers require the advance approval of one of the federal banking agencies. In the Bank Merger Act of 1966, Congress established a new standard to guide the agency in determining whether to approve a proposed merger that appears to be anticompetitive. The Act provides that no bank merger may be approved whose effect "may be substantially to lessen competition" unless the agency finds that effect to be "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." Should an approved merger be challenged as violating any provision of the antitrust laws, the district court must apply the same standard.

Last Term, this Court, noting that Congress in enacting the 1966 Act determined "that antitrust standards were the norm and anticompetitive bank mergers, the exception," held that the merging banks have the burden of proving that a merger which may substantially lessen competition should nevertheless be permitted by reason of the public benefits it con-

fers on the community. *United States* v. *First City Nat. Bank of Houston,* 386 U.S. 361, 366. So ruling, the Court held expressly (*id.* at 368–369) that the district court is to make an independent determination of the issues and is not to confine its consideration to whether the banking agency's application of the statutory standard to the facts of the particular case is supported by substantial evidence and in accordance with correct general principles of law. The district court in the present case (decided before *Houston*) apparently adopted the limited conception of its function rejected by this Court (see R. 90–91, 108); and that alone would warrant reversal. Since, however, as noted in our Jurisdictional Statement (p. 12, n. 6), there is language in the district court's opinion which suggests that it may have rested its decision, alternatively, on its own, independent view of the issues, we proceed to the consideration of three other questions of major importance in the administration of the new law which this case also raises. The first is whether, in determining the competitive impact of a challenged bank merger, the court should apply the standards of Section 7 of the Clayton Act. The second is whether a substantially anticompetitive merger may be excused because of clearly offsetting community benefits in the absence of a finding that there was no reasonable probability of achieving those benefits by less anticompetitive means.

The competitive test of the 1966 Act—whether the effect of the challenged merger "may be substantially to lessen competition"—is identical to that of Section 7 of the Clayton Act. And the legislative history of

the 1966 Act demonstrates, as we detail *infra,* pp. 21–22, that the adoption of the Section 7 standard was deliberate. As this Court has already ruled, the new Act merely creates a new defense to actions challenging bank mergers under the antitrust laws; it does not alter the standard which those laws prescribe for determining competitive effect (*First City Nat. Bank of Houston*). Nor is there any sound reason of policy why, in bank merger cases alone, the superseded Sherman Act test of *United States* v. *Columbia Steel Co.*, 334 U.S. 495, should govern, as the court below thought. Tested by the principles elaborated in this Court's Section 7 decisions, it is clear that the effect of the challenged merger in the instant case—a merger that created a single bank with nearly 40 percent of the business of an already highly concentrated banking market—"may be substantially to lessen competition."

Since the district court mistakenly discounted the anticompetitive effect of the challenged merger, its finding that such effect was clearly outweighed by the probable effect of the merger in saving Nashville Bank (the acquired bank) from continuing to "flounder" is fatally undermined. In addition, the defense of offsetting public benefits must fail because the record provides no support for a conclusion that so anticompetitive a method as merger with Third National could reasonably be thought necessary to solve the problems of the acquired bank. In view of Congress' paramount concern with preserving, so far as possible, effective competition in the banking industry, a

bank merger which may substantially lessen competition should not be upheld on the basis of its benefits to the community if those benefits could be achieved by some other, and less anticompetitive, method. The problems of management succession and limited facilities which confronted Nashville Bank could probably have been resolved by reasonable initiative on the part of the owners, without even an infusion of new capital. The owners (who apparently purchased the bank primarily for speculative purposes) made no effort to apply such remedies, but instead concentrated on selling the bank regardless of the effect on competition. We also question—apart from the failure to seek alternatives to the merger—whether the benefits it conferred even reached the level at which they could properly be asserted as justification under the Act for a substantial impairment of the competitive structure of the community's banking industry.

Since the merger was substantially anticompetitive, and the defense provided by Congress in the Bank Merger Act of 1966 was not made out, the judgment below should be reversed and the case remanded for the entry of a remedial decree. The possibility that divestiture may prove to be impracticable affords no reason for upholding the dismissal of the government's complaint, especially since Congress expressly determined that this particular merger should *not* be excused merely on account of the alleged difficulties of unscrambling it.

I. THE TEST OF COMPETITIVE EFFECT UNDER THE BANK MERGER ACT OF 1966 IS IDENTICAL TO THAT UNDER SECTION 7 OF THE CLAYTON ACT

A. The Bank Merger Act of 1966 makes illegal any bank merger whose effect "may be substantially to lessen competition," unless such effect is "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." Accordingly, the initial question in every case governed by the Act is the impact of the challenged merger on competition. The court below held that, in appraising this impact, the applicable standard is that prescribed by this Court in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, to govern mergers challenged under Section 1 of the Sherman Act—a broad "rule of reason" standard (see *United States* v. *First Nat. Bank of Lexington,* 376 U.S. 665; and Statement, *supra,* p. 12, n. 9). We, on the contrary, urge that the correct standard is the more stringent test of Section 7 of the Clayton Act, 15 U.S.C. 18, as it has been interpreted by this Court in a number of recent decisions.

1. This Court, we contend, has already so ruled, albeit in a slightly different context, in its first decision construing the new Bank Merger Act. *United States* v. *First City Nat. Bank of Houston,* 386 U.S. 361. One of the contentions made in that case was that an antitrust complaint against a bank merger must allege a violation of the Bank Merger Act of 1966, and that it was not sufficient to charge that the merger might substantially lessen competition in viola-

tion of Section 7 of the Clayton Act. This Court disagreed. It held that the 1966 Act did not create a new cause of action, displacing that afforded by Section 7, but merely added a new defense (community convenience and needs) which might be asserted in cases brought against bank mergers under the existing antitrust laws. "What is apparent is that Congress intended that a defense or justification be available once it had been determined that a transaction would have anti-competitive effects, *as judged by the standards normally applied in antitrust actions.*" 386 U.S. at 364, emphasis added.

Thus, where, as in the present case, the government challenges a bank merger as violating Section 7 of the Clayton Act,[10] the court must first decide whether the standard of that Act has been violated, since "Section 7 of the Clayton Act condemns mergers where 'the effect of such acquisition may be substantially to lessen competition' [and] [t]he Bank Merger Act of 1966 did not change that standard." 386 U.S. 365.[11] Only if it is found that the conventional antitrust standard has been violated does the new defense provided by the 1966 Act in antitrust cases challenging bank mergers come into play.

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[10] A violation of Section 1 was also alleged; but we did not appeal the dismissal of that charge (n. 1, *supra*, p. 2).

[11] So, also, in rejecting the argument that the standard of illegality in the Bank Merger Act is not a justiciable one, this Court noted: "A determination of the effect on competition within the meaning of § 7 of the Clayton Act is a familiar judicial task." 386 U.S. at 369. This observation would have been irrelevant if that standard were not embodied in the 1966 Act.

2. This Court's conclusion in the *Houston* case was plainly correct.

(*a*) We think it highly significant that the competitive standard of the Bank Merger Act is drawn verbatim from Section 7. The test under both provisions is whether the effect of the challenged merger "may be substantially to lessen competition." To be sure, under Section 7 the specified effect may be shown "in any line of commerce in any section of the country," and the Bank Merger Act omits the words, "in any line of commerce." Conceivably, this omission may have been intended to authorize agency and court in appropriate cases to adopt a product market broader than commercial banking, the line of commerce held appropriate in *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 356–357—although we think that was not, in fact, Congress' purpose.[12] But, whatever the proper scope of the product market, the language change surely did not alter the standard for determining competitive effect once the market is delineated. In the present case, the district court found that commercial banking was the appropriate

[12] Senator Robertson took this view (112 Cong. Rec. 2655, 2663), but his comments appear to be wholly isolated and unrepresentative of the thinking of the majority. Very probably "line of commerce" was omitted either inadvertently or with the thought that, since the Bank Merger Act was limited to banking, proof of the appropriate line of commerce in each case would be superfluous. Or, perhaps, Congress felt that the language was unnecessary for the reason that even in the Sherman Act cases, where proof of a "line of commerce" is not required by the statute, this Court has applied the concept—notably in a bank merger case, *United States* v. *First Nat. Bank of Lexington, supra.*

line of commerce, and appellees have not challenged that finding. Thus, no question of "line of commerce" arises here. The issue whether "may be substantially to lessen competition" in the relevant market means different things under Section 7 and under the Bank Merger Act is clearly posed.

(*b*) The adoption of the Section 7 test by the framers of the Bank Merger Act of 1966 was not inadvertent. As to this, the legislative history is explicit. Congressman Reuss, who drafted this portion of the Act, stated: "This language was intentionally used so as clearly to indicate * * * that the antitrust standards which have been developed over the last 75 years on the basis of case law definition of these statutory provisions are intended to be incorporated in the application of the proposed Act." 112 Cong. Rec. 2444. Congressman Minish similarly observed "that the competitive factor to be used is drawn directly from Clayton Act section 7 and Sherman Act section 1. [13] Thus, all of the principles developed over the last 75 years in regard to these statutes, such as the definition of relevant market and the

[13] This does not mean that the competitive standard under the Bank Merger Act is somehow a meld of Section 1 and Section 7. Rather, the Act specifies alternative standards drawn from these statutes. Under the Act, a merger is illegal (in the absence of a clear showing of justification based on the convenience and needs of the community to be served) "whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, *or* which in any other manner would be in restraint of trade". Emphasis added. Thus, plainly, proof that the merger may substantially lessen competition is sufficient, and no violation of Sherman Act Section 1 principles need also be shown.

failing company doctrine are carried forward unchanged by this proposed legislation." 112 Cong. Rec. 2451. And Congressman Patman—who was the sponsor of the bill that was finally enacted and whose comments on the meaning of the Act were heavily relied upon by this Court in *First City Nat. Bank of Houston, supra,* 386 U.S. at 366—stated flatly that "the competitive standard to be applied is clearly that of the Sherman and Clayton Acts" (112 Cong. Rec. 2441).

(*c*) This Court has observed that, under the 1966 Act, "antitrust standards were the norm" (*First City Nat. Bank of Houston, supra,* 386 U.S. at 366); as Congressman Patman stated, Congress' intention was to "make the competitive factor preeminent" (112 Cong. Rec. 2441). See, also, H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 3–4, cited at 386 U.S. 366. To apply a watered-down version of anticompetitive effect—to discard the strong prophylactic principles developed by this Court in interpreting and applying Section 7—would, in our view, ill comport with that fundamental congressional objective.

(*d*) No sound reason of policy supports giving the identical statutory language a different meaning in those Section 7 cases in which the Bank Merger Act provides a special defense. It is not as if competition operated so differently in the banking industry that the teachings of this Court with respect to the competitive effect of mergers were somehow inapplicable. This Court has never thought so. Indeed, one of its landmark Section 7 cases involved a bank merger. *United States* v. *Philadelphia National Bank,* 374 U.S. 321. It would only cause pointless confusion to jettison

the well developed body of doctrine applicable to mergers challenged under Section 7. Certainly, there is no reason to prefer a standard developed by the Court to deal with an industrial, not a banking, merger (*Columbia Steel*) and later superseded (*United States* v. *First Nat. Bank of Lexington*, 376 U.S. 665).[14]

In sum, Congress accommodated the allegedly unique conditions of the banking industry by providing a defense—based on the convenience and needs of the community—not allowed in conventional merger cases. But it did not, we submit, also alter the standards for deciding the threshold question whether a bank merger's competitive effects are sufficiently adverse to warrant condemnation in the absence of a good defense.

B. It remains to note that the effect of the merger at bar "may be substantially to lessen competition" under the decisions of this Court explicating Section 7. The bank resulting from the merger accounted for some 40 percent of the commercial banking business of the relevant area, a far higher percentage than that produced by most of the mergers which this Court has struck down under Section 7. *E.g., United States* v. *Von's Grocery Co.,* 384 U.S. 270. Moreover, the merger increased the market share of the three largest banks in the relevant market from 93 to 98 percent, and eliminated the only bank outside of this dominating group whose market share made it a substantial competitive factor, for none of the remaining banks had so

[14] "The *Columbia Steel* case must be confined to its special facts." 376 U.S. at 672.

by this Court in *First City Nat. Bank of Houston, supra,* at 366, the framers of the Bank Merger Act of 1966 stated: "the bill acknowledges that the general principle of the antitrust laws—that substantially anticompetitive mergers are prohibited—applies to banks, but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served * * * that it would be in the public interest to permit it." [16] We submit that this design would be subverted if anticompetitive mergers which conferred some benefits upon the community were permitted in instances where the benefits could have been achieved by a less anticompetitive method that was practicable in the circumstances, such as an infusion of new management, or a sale or merger not involving a direct competitor. See 112 Cong. Rec. 2445 (remarks of Congressman Reuss).

The public interest is not promoted by a merger which needlessly impairs the prospects of effective competition. The convenience and needs of the community are not served by unnecessarily eliminating a competitor. We submit that, if the benefits of the merger can be achieved by other and less anticompetitive means, the procompetitive policy underlying the Bank Merger Act requires that the merger be blocked—just as, in the "related" (*First City Nat. Bank of Houston, supra,* at 369) area of the failing-

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[16] The legislative history indicates that the core of congressional concern, in allowing a community convenience and needs defense, was with "floundering" banks. H. Rep. *supra,* p. 3; 112 Cong. Rec. 2442, 2443, 2445, 2452, 2457, 2458, 2459–2460, 2654, 2659.

company defense, this Court has indicated that the existence of a less anticompetitive method of averting failure than the challenged merger is a material circumstance in considering the merger's legality. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 665; *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, 302. See, also, Hearings Pursuant to S. Res. 61 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., Pt. 1, p. 326; *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955), p. 123.

Correlatively, we urge that, before a bank merger which may substantially lessen competition is excused on the ground that it was necessary to solve the problems of a floundering bank, the defendants be required to show that they made reasonable efforts to determine whether less anticompetitive solutions were available.[17] By this test, it is clear that the convenience and needs defense of the appellee banks in this case should have been rejected. For even assuming, *arguendo*, that the acquired bank (Nashville Bank) was floundering, that the merger improved its prospects and that by so doing it clearly benefited the community more than it harmed it by eliminating a direct competitor in a highly concentrated market, the fact remains that the owners did not make a reasonable effort to achieve these desirable ends otherwise than by

[17] Perhaps, where actual failure appears imminent, a shortened search for alternatives will suffice. The Act itself makes special provision for emergencies. 12 U.S.C. (Supp. II) 1828(c)(6). But there was no threat of imminent—or any—failure in the present case.

effecting the challenged merger; and less anticompetitive methods of rehabilitating Nashville Bank were in fact feasible. The defense therefore fails.

B. Nashville Bank, before the merger, was growing and profitable. Admittedly, it had problems, such as an ill and aging president and an insufficiency of adequate modern facilities, which persuaded the district court that it was floundering (but see *infra*, pp. 31–32). Shortly before the merger, the bank was purchased by the Weaver group (who were aware at the time of purchase of the bank's problems, R. 491), and it was they who sold out to appellee Third National. Under our view of the purpose of the convenience and needs defense—to excuse anticompetitive mergers which are *necessary* to confer substantial public benefits—the critical questions here are (1) what efforts the Weaver group took to solve the bank's problems short of the highly anticompetitive merger eventually chosen and (2) what the prospects would have been for such solutions.

The foremost problem facing the bank, perhaps, was management succession. Clearly, the two-month interval between the Weaver group's agreement to purchase the bank from Hill and Hackworth and the agreement to sell out to Third National did not afford sufficient time to explore fully the possibility of resolving the problem of management succession simply by hiring new officers. At all events, even within the two-month period, the Weaver group made no serious efforts toward such a solution. They did not approach a single individual in Nashville with respect to the position of president (R. 526–527), did not enlist the

aid of a management-recruitment firm and their only effort to interest an individual in the post was acknowledged by Weaver to have been "facetious to a degree" (R. 528–530). There is no good reason to believe that Nashville Bank, a growing institution with substantial and rising profits, could not have attracted competent management, if only by the simple expedient of raising executive salaries which were below those of its larger competitors.

The bank's other shortcomings apparently could also have been resolved with relative ease without a merger, had the Weaver group been genuinely bent on the improvement of the bank's condition. For example, expansion of its branch system—one of its principal requisites—could have been begun at a cost of $51,000 per branch (R. 477). This was well within the bank's capabilities: during a two-year period, a bank in Nashville that was one-fifth the size of Nashville Bank opened *two* branches (Fdg. 74, R. 123). Or, semi-automated equipment (appellees' own witness testified that computers were not necessary in a bank of this size, R. 683–684) could have been installed, at a cost of only about $50,000 (R. 693). None of these modest efforts at internal expansion and modernization was undertaken, despite their apparent feasibility.

Appellees' own witness testified that Nashville Bank could have been made modern and efficient by a total expenditure of only $575,000—a sum that would have covered (1) a salary scale comparable to Third National's, (2) a funded pension plan, (3) remodeled offices, (4) a business development department, (5) an auditing department, (6) a credit department, (7)

two branches, and (8) automation, including rental of a computer (R. 418). This range of expenditures was not beyond the reach of a firm that had net earnings (before taxes) of $567,000 in 1963 (R. 1162), especially since there was no need to incur all of these expenses at once, some would have been non-recurring and all—if truly necessary—should have produced greatly increased earnings. Certainly, a firm as profitable as Nashville Bank could have made a very considerable start toward a more modern operation without seeking capital from outside, much less merging with another bank.

Finally, the Weaver group made no efforts to make a sale of the Nashville Bank that would not have impaired the competitive structure of the market as did the sale to Third National. Nashville Bank was evidently a very desirable property. After owning it for only two months the Weaver group was able to sell it at a profit of almost $750,000 on their investment of $3.8 million (R. 499, 534–536; Fdg. 122, R. 130). Perhaps, a sale to another party might have resulted in a smaller profit, but the policies of the Bank Merger Act do not make the financial interest of the owners the paramount consideration. They require, in our view, that all practicable alternatives to a highly anticompetitive merger be explored. That was not done here;[18] the district court's finding that the "bank

[18] Immediately after the Weaver group bought Nashville Bank, Commerce Union—a Nashville Bank smaller than Third National—offered to buy it at a figure that would have provided Weaver and his associates with a profit, albeit a smaller one than the sale to Third National. Weaver rejected Commerce Union's offer. Such a merger would still have been anticompetitive. But assuming (as we do not, see *supra*, pp. 28–30,

could not have been revitalized" other than by the challenged merger (R. 103) stands as wholly conclusory and without support in the record.

C. Thus far, we have assumed that, had there been no means other than the challenged merger of solving Nashville Bank's problems, the merger would be justified, despite its anticompetitive impact, by reason of its probable effect in meeting the convenience and needs of the community to be served. In fact this is highly doubtful. As mentioned (n. 16, *supra*, p. 26), the core of the convenience and needs defense as envisaged by Congress was the problem of the "floundering" bank, which we understand to mean a bank that, while not in imminent danger of actual failure, has problems of sufficient gravity to threaten ultimate failure unless prompt steps are taken to solve them. Nashville Bank was not floundering in this sense. To be sure, it had a problem of management succession and a need to modernize and expand its facilities. But what firm does not periodically confront such difficulties? Ordinarily, these problems are not critical and they were not so here. Nashville Bank's steady growth in business and profits negates any inference that it was stagnant or in decline.

Beyond the floundering bank, Congress may have wished agency and court in appraising the conven-

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and *infra*, pp. 31–32) that a merger with Third National or Commerce Union afforded the only means of rehabilitating Nashville Bank and that the benefits of such rehabilitation clearly outweighed any competitive harms, the policies of the Bank Merger Act, in our view, required a merger with Commerce Union, since it would have been somewhat less harmful to the competitive structure than the merger with Third National.

ience and needs defense to consider whether the merger brought the community a new and important banking service or benefit. See H. Rep. No, 1221, 89th Cong., 2d Sess., p. 3; 112 Cong. Rec. 2457, 2655. But there was no showing here that any services which Nashville Bank may have been unable to provide on its own were important services not available to the community in sufficient abundance or that the merger conferred important benefits upon any class of customers.[19] In short, the public benefits of the merger did not clearly outweigh its competitive detriment.

CONCLUSION

Tested by proper standards, the challenged merger is illegal, since it may substantially lessen competition within the meaning of Section 7 of the Clayton Act and the defense given by the Bank Merger Act has not been established. Therefore, the judgment of the district court should be reversed and the case re-

[19] The district court's opinion predicates approval of the merger solely upon its alleged effect in curing Nashville Bank's "floundering" condition (R. 108). While its findings of fact recite several other community benefits (Fdgs. 196–197, R. 141–142), they seem plainly insignificant. Thus, the fact that the merger increased Third National's legal lending limit by $400,000 to $2.4 million was hardly of great significance to the community. First American National Bank had a limit of $2.5 million at the time of the merger; and the relatively few businesses needing amounts in excess of such limits could readily obtain financing elsewhere. Cf. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 371. Similarly, in providing customers of Nashville Bank with more offices, special types of checking accounts and savings plans, the merger hardly conferred any unique or significant new benefits upon the community at large.

manded with instructions to enter an appropriate remedial decree.[20]

Respectfully submitted.

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[20] Appellee banks in their motion to affirm urged alleged problems of divestiture as a basis for affirmance. But problems of relief do not bear on the question of illegality. Moreover, Congress specifically determined *not* to forgive the instant merger, albeit it had been consummated prior to the enactment of the Bank Merger Act of 1966. See H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 4–5.